STANDARD CHARTERED BANK MALAYSIA BHD

v.

BENJAMIN KRK SAMY & ANOR

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[ORIGINATING SUMMONS NO: MT3-24-67-98]
19 OCTOBER 2001

CIVIL PROCEDURE: *Judgments and orders - Amendment of order - Accidental slips or omissions - Clerical errors - Slip-rule - Application of - Whether only applies to errors in expressing intention of court - Whether applies to errors made by litigant or his solicitor - Rules of the High Court 1980, O. 20 r. 11 - Inherent power of court to amend - Doctrine of functus officio - Whether precludes application of slip-rule*

This was an application by the plaintiff to, *inter alia*, amend an earlier order of the court, particularly, to delete the figure RM312,239.93 stated therein and substitute therefor the figure RM1,786,204.78. Whilst conceding that it had stated the wrong amount in its second affidavit in support of the originating summons, the plaintiff argued that it did state the correct amount in the letter of demand and in the statutory notice in Form 16D as well as in its first affidavit in support of the originating summons. Hence, the plaintiff prayed that its application be allowed under the slip-rule pursuant to O. 20 r. 11 of the Rules of the High Court 1980 ('RHC'). The defendant argued that the slip-rule applies only in respect of accidental slips on the part of the court in expressing its intention and not in respect of errors made by a litigant or his counsel. The defendant also argued that the court was *functus officio* after having made the earlier order.

Held:

[1] Errors arising from accidental slips or omissions may be corrected under the slip-rule pursuant to O. 20 r. 11 of the RHC, even though the judgment or order as drawn does in fact represent the intention of the court at that time. The slip-rule would also appear to cover the errors made by a litigant or his counsel. (pp 175 h-i & 176 a-c)

[2] Additionally, the court has the inherent power to correct errors to give a clear expression to its intentions in the judgment or order which has been perfected. Such a power exists to enable the court to correct the record to make it consistent with the judgment or order which it obviously meant to pronounce. (pp 176 h-i & 177 a-b)

[3] The doctrine of *functus officio* does not forbid the amendment of any judgment or order under the slip-rule. (The slip-rule may be regarded as an exception to the doctrine.) The doctrine also cannot subjugate the inherent jurisdiction of the court to dispense justice in a particular case. (pp 178 b-c & 179 f-g)

[Order in terms of plaintiff's application.]

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Malacca Development Corpn Sdn Bhd & Ors [1997] 3 CLJ 51 ***(foll)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 ***(dist)***

Hession v. Jones [1914] 2 KB 421 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 ***(refd)***

Kelsey v. Doune [1912] 2 KB 482 ***(refd)***

Maimunah Megat Montak v. Mayban Finance Bhd [1996] 3 CLJ 9 ***(refd)***

Malayan United Finance Bhd (Formerly known as Tong Bee Finance (Malaysia) Bhd) v. Sykt Tiam Choy Moto (a firm) & Ors [1983] 1 CLJ 307; [1983] CLJ (Rep) 624 ***(dist)***

Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd [1988] 1 CLJ 8; [1988] 1 CLJ (Rep) 193 ***(foll)***

Mutual Shipping Corp of New York v. Bayshore Shipping Co of Monrovia The Montan [1985] 1 All ER 520 ***(foll)***

Oriental Bank Bhd v. Sykt Zahidi Sdn Bhd [1999] 1 CLJ 810 ***(foll)***

Re St Nazaire Co 12 Ch D 88 ***(refd)***

Tak Ming Co Ltd v. Yee Sang Metal Supplies Co [1973] 1 WLR 300 ***(refd)***

Legislation referred to:

National Land Code, s. 328(3)

Rules of the High Court 1980, O. 20 r. 11

Rules of the Supreme Court 1957, O. 28 r. 11

Arbitration Act 1950 [UK], s. 22(1)

For the plaintiff - Jeyanthini Kannaperan; M/s Shearn Delamore & Co

For the defendants - Prasad Abraham; M/s Prasad Abraham & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Low Hop Bing J:

Application

Vide summons in chambers in encl. (38), the plaintiff applied for the following orders:

1. that the order of the court dated 29 June 1998 be amended by deleting the amount RM312,239.93 and substituting therefor the amount RM1,786,204.78;

2. that the disbursement of the proceeds of sale pursuant to the auction held in this court on 29 February 2000 be stayed pending the disposal of this application in encl. (38); and

3. costs to be paid by the plaintiff.

Facts Of The Case

The defendants have *vide* Perserahan (presentation) No. 1622 1/94 Jilid 31 Folio 20 charged their property, held under HS(D) No. 20197, PT No. 13106, Mukim Kajang, together with a bungalow house erected thereon, to the plaintiff as security for banking and financial facilities *viz*. term loan and overdraft facilities.

As a result of the defendants' default, as at 5 November 1996, the term loan fell into arrears of RM243,080.74, while the overdraft facility showed an outstanding sum of RM1,199,235.23 on 31 October 1996. Plaintiff has duly issued statutory notice in Form 16D of the National Land Code 1965 to the defendants demanding payments therefor. However, at the hearing of the originating summons, the plaintiff has wrongly stated the sum of RM312,239.93 as the amount outstanding and so the order for sale made thereon also reflected an outstanding sum of RM312,239.93.

The plaintiff was unaware of the error until 13 September 2000, when the plaintiff's solicitors received the bailiff's statement which showed that the said property was sold for RM1,052,500. The plaintiff's error arose in the plaintiff's second affidavit in support of the said originating summons, whereas the said Form 16D stated the sum of RM302,236.63 as outstanding term loan as at 29 June 1998, while the sum of RM1,483,968.15 was reflected as the outstanding sum in the overdraft facility.

Interest was agreed at 16.3% per annum on a daily basis from 30 June 1998 ie, at RM662.70 per day until full and final realisation.

On the basis of the aforesaid error, the plaintiff prays for an order to effect the amendment.

These facts are uncontroverted.

Submission For Plaintiff

Cik Jeyanthini Kannaperan, learned counsel for the plaintiff, relied on the slip rule under O. 20 r. 11 to support the plaintiff's application, to amend the order although it has been sealed. She added that the letter of demand and Form 16D, *supra*, have correctly stated the amount in arrears ie, RM1,442,315.97 due in October 1996, so also the first affidavit in support of the originating summons. She said that encl. (6) showed the total amount outstanding as RM1,786,204.78. The order in question had erroneously stated the amount of RM312,239.93, and that the error, although recognised and admitted by the defendants, was now used by the defendants as the basis of the defendants' objection to the amendment.

Contention For Defendants

Encik Prasad Abraham and Cik Veronica Dominic, both learned counsel for the defendants, raised two issues *viz.*:

1. the slip rule does not apply as there was never a mistake in the intention of the court in granting the order for sale; and

2. the court is *functus officio.*

They expanded the submission by saying that the slip must be the slip of the court and not that of the plaintiff or the plaintiff's counsel. They added that this is not a simple matter of amending an order for sale, but an amendment which would be completely out of tandem with the order which has been perfected, pursuant to which, an auction has been held, resulting in the sale of the said property to the successful purchaser.

On the issue of *functus officio,* they elaborated that the only duty for the court to do now is to distribute the proceeds of sale in accordance with s. 328(3) of the National Land Code 1965 and the plaintiff may claim for the balance sum by way of a civil suit against the defendants in the light of the plaintiff's mistake.

Decision Of The Court

The fundamental provision which calls for judicial interpretation is contained in O. 20 r. 11 which is reproduced as follows:

> **Amendment of judgment and orders**
>
> 11. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court by summons without an appeal.

The Federal Court in *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143 held that the court has no power under any application in the same action to eg, alter or vary an order after it is drawn up, except under the slip rule in O. 28 r. 11 Rules of the Supreme Court 1957 (= O. 20 r. 11 of the Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: per Chang Min Tat, FJ (as he then was), referring to *Re St. Nazaire Co.* 12 Ch. D 88; *Kelsey v. Doune* [1912] 2 KB 482 and *Hession v. Jones* [1914] 2 KB 421.

The slip rule has long been recognised and invoked in cases where the justice of the case appears necessary and advisable. Hence, in *Mutual Shipping Corp of New York v. Bayshore Shipping Co of Monrovia The Montan* [1985] 1 All ER 520, the arbitrator had acknowledged his mistake in his award as to the actual fuel consumption and the charterers applied to the court for an order that the award be remitted to the arbitrator under s. 22(1) of the Arbitration Act 1950 (UK) so that he could correct the error. The Court of Appeal held that although the said s. 22 did not enable the arbitrator to correct errors of judgment, it provided the ultimate safeguard to prevent injustice by giving the court a wide power to remit an award to the arbitrator where he had made either a clerical mistake or an error arising from an accidental slip or omission. Sir John Donaldson, MR, at p. 525 g-h observed as follows:

> In the instant case, Mr Clark has accidentally made a major error, which, if uncorrected, would lead to the charterers paying the owners, when it is the owners who should be paying the charterers. No court could lend the power of the state to the enforcement of such an award and no court should stand by when it has power to correct such an accidental error, and I stress the word 'accidental'. The only matter which has caused me any surprise or concern, and surprise is an understatement, is that the owners have sought desperately to take advantage of this accidental error in order to secure a windfall profit to which they have no claim whatsoever in law or justice. Such conduct does them no credit whatsoever.

Robert Goff, LJ in the same case referred to:

> a long line of authority which shows that errors arising from accidental slips or omissions may be corrected under the slip rule, even though the judgment or order as drawn does in fact represent the intention of the court at that time. In *Fritz v. Hobson* [1880] 14 Ch D 542, [1874-80] All ER Rep 75 Fry J exercised the power to correct an order to award certain costs to the plaintiff which his counsel had accidentally omitted to draw to the attention of the court. In *Barker v. Purvis* [1887] 56 LT 131 a judgment was drawn up on the basis that certain payments of interest had been made from a certain date. This was due to the accidental slip of one of the parties. The

> Court of Appeal held that the judgment could be corrected under the slip rule. In *Chessum & Sons v. Gordon* [1901] 1 KB 694, [1900-3] All ER Rep 260 one of the parties 'by a pure slip' did not include in his bill of costs for taxation an item which obviously ought to have been included. The Court of Appeal held that the order could be corrected under the slip rule by including the relevant item. In *Armitage v. Parsons* [1908] 2 KB 410 the plaintiff signed a judgment in default of appearance by the defendant, and through a slip his solicitor's clerk included in the sum in respect of which judgment was signed costs on too high a scale, so that the judgment was signed for a sum which was too high by 12s. The Court of Appeal held, by a majority, that the defendant was not entitled to have the judgment set aside, but the judgment should be amended under the slip rule. In *Re Inchape, Craigmyle v. Inchcape* [1942] 2 All ER 157, [1942] Ch 394 Morton J corrected an order to add costs which had been omitted as the result of the accidental omission of counsel to ask for them to be included.

His Lordship saw "no reason why, if a court gives judgment in, for example, a certain sum, and the order is then drawn up and perfected, and it is afterwards discovered that the court has, by accident, miscalculated the figure or omitted an item from it, the error in the order should not be corrected under the slip rule."

In *Malaysian International Merchant Bankers Berhad v. Dhanoa Sdn Bhd* [1988] 1 CLJ 8; [1988] 1 CLJ (Rep) 193 it was argued for the respondent that the order for sale of the charged lands did not require the registrar of the High Court to fix a reserve price, but the Supreme Court through the judgment of George Seah, SCJ held that this may be remedied by a subsequent application under O. 20 r. 11, although I am mindful of a subsequent decision of the Federal Court in *Maimunah bte Megat Montak v. Mayban Finance Bhd* [1996] 3 CLJ 9 to the effect that an order for sale which had neither fixed the auction date nor stipulated the amount due under the charge was invalidated, but it must be immediately emphasised that the *Maimunah* case is not a case touching on amendment.

In *Arab-Malaysian Finance Bhd v. Malacca Development Corporation Sdn Bhd & Ors* [1997] 3 CLJ 51, 62 Augustine Paul, JC (now J) observed as follows:

> It is settled law that after a judgment or order has been perfected amendments may only be made to it in relation to clerical errors, accidental slips and omissions as provided by O. 20 r. 11 of the Rules of the High Court 1980 (see *Khoo Cheng Tat v. Lim Soon Teck* [1982] 1 MLJ 289; *Tak Ming Co. Ltd. v. Yee Sang Metal Supplies Co.* [1973] 1 WLR 300; *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143). However, the court has an inherent power to correct errors to give a clear expression

> to its intentions in the judgment or order which has been perfected (see *Pearlman (Veneers) SA (Pty) Ltd. v. Bernhand Bartels* [1954] 1 WLR 1457). Such a power exists to enable the court to correct the record to make it consistent with the judgment or order which it obviously meant to pronounce (see *Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd.* [1990] 2 CLJ 1044 ([1990] 2 CLJ (Rep) 125); *Hatten v. Harris* [1892] AC 560; *Koperasi Perumahan Kotawira Bhd. v. Kadir bin Kassim & 2 Ors.* [1991] 2 CLJ 1529 ([1991] 3 CLJ (Rep) 53)).

In *Oriental Bank Berhad v. Syarikat Zahidi Sdn Bhd* [1999] 1 CLJ 810, the plaintiff has failed to ask for a specific date on which the auction ought to have been held pursuant to an order for sale. Kamalanathan Ratnam, J held that the said order ought to be able to be corrected under the slip rule or the inherent jurisdiction of the court.

Even considerable delay in making the application under the "slip rule" would not prevent the court from making an order that a judgment be corrected by including an order for the payment of interest on a judgment sum: *Tak Ming Co Ltd v. Yee Sang Metal Supplies Co* [1973] 1 WLR 300, 306 to 307, JCPC.

In *Malayan United Finance Bhd (Formerly Known As Tong Bee Finance (Malaysia) Bhd) v. Sykt Tiam Choy Moto (a Firm) & Ors* [1983] 1 CLJ 307; [1983] CLJ (Rep) 624, which was relied upon by the defendant, the facts of the case demonstrated that the learned registrar has dismissed the plaintiff's application to amend a default judgment by adding a new prayer which reads as follows:

> Such further sums of the monthly instalments paid by the plaintiff's hirers to the 1st defendant after the 28 February 1979.

On appeal, Wan Yahya, J (later FCJ) upheld the registrar's decision and dismissed the appeal as the plaintiff therein although a party to the judgment has failed to satisfy the three other requirements *viz*. the proposed amendment to the order or judgment was intended to correct a mistake in the judgment and to bring it in line with the manifest intention of the court; the proposed amendment to that part of the judgment will not render it irregular or a nullity and it is not inexpedient or inequitable to do so. It is therefore obvious that the facts in that case are substantially different from those in the instant case before me.

Citibank NA v. Ibrahim bin Othman [1994] 1 MLJ 608, from which the defendants derived support, does not decide on the issue of amendment under O. 20 r. 11. The order for sale in the instant case has not been challenged and there was no appeal therefrom, in which case it remains a legally binding order. That being the case, the defendants are not at liberty to reopen the issue on the validity of the order for sale in the instant case.

Finally the defendants sought reliance on the Federal Court decision in *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 in support of the issue of *functus officio*, thereby preventing the court from amending an order or judgment of the court pursuant to the slip rule. I have had the opportunity of perusing the detailed and comprehensive judgment of Mohd Azmi, FCJ (as he then was) but I could not find any enunciation on the principles governing the doctrine of *functus officio* preventing the amendment of any order or judgment pursuant to the slip rule. The learned Federal Court judge, (with whom the then learned Chief Justice of the Federal Court Tun Eusoff Chin, Wan Adnan, FCJ (now PCA) agreed), towards the penultimate paragraph of the judgment, stated that the principle of *functus officio* could not in any way defeat the inherent jurisdiction of the court to do justice in that particular case.

Peh Swee Chin FCJ (as he then was) in the same case related the chequered history of the case before the High Court and the Court of Appeal, and then referred to the new proceeding in Originating Summons No. 24-110-1995 wherein an order ("order directly concerned") was made setting aside part of the previous order. The chargee appealed from the order directly concerned and the appeal was allowed by the Court of Appeal on the ground that the said previous order (which had been perfected before the new originating summons was filed) could not be varied or altered except on appeal and further the slip rule under O. 20 r. 11 did not apply either. The Court of Appeal relied on the Federal Court case of *Hock Hua Bank, supra* and held that the High Court was *functus officio* with regard to the order directly concerned and was wrong in making it. The appeal before the Federal Court was against the said decision of the Court of Appeal.

In respect of this particular aspect of the appeal to the Federal Court, Peh Swee Chin FCJ (as he then was), so also the Court of Appeal, had no doubt whatsoever that *Hock Hua Bank, supra*, had clearly stated that the court has no power under any application in the same action to eg, alter or vary a judgment regularly obtained after it has been entered or an order after it is drawn up except under the slip rule in O. 28 r. 11 of the Rules of the Supreme Court 1957 (= O. 20 r. 11 of the Rules of the High Court 1980) so far as necessary to correct errors in expressing the intention of the court. His Lordship at p. 103 reiterated as follows:

> When a judgment in the High Court has been perfected in the manner described in the above passage, a party to the judgment generally and subject to the same passage, or any other written law, and apart from any appeal, cannot reopen the matter finalised in the judgment by seeking to alter it or amend it for the court would be *functus officio* by virtue of the *ratio* of *Hock Hua Bank v. Sahari bin Murid*. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation (see *Issac v. Robertson* [1985] AC 97; *Pembenaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; *Puah Bee Hong & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and Another Appeal* [1994] 2 MLJ 601).

And then added at p. 103:

> The *Hock Hua Bank*'s case, if I may say with respect, is a classic for its incontestable precedentwise correctness, clarity and untedious precis. Its *ratio* was followed by the Supreme Court in *MUI Bank Bhd v. Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 4 CLJ 2229 (SC); *Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors* [1997] 2 CLJ 58 (SC); *Oversea-Chinese Banking Corp Ltd v. Sindoma Realty Sdn Bhd* [1989] 1 MLJ 377; *Sykt Marak Jaya Sdn Bhd v. Sykt Masinda Sdn Bhd* [1991] 1 CLJ 809. The English parentage of *Hock Hua Bank v. Sahari bin Murid* is *Ainsworth v. Wilding* [1896] 1 Ch 673 which was approved and adopted in two Privy Council cases, *viz Firm of RMKRM v. Firm of MRMVL* [1926] AC 761 and *Kinch v. Walcott* [1929] AC 482.

In so far as the judgment of Peh Swee Chin FCJ (as he then was) is concerned, it is clear that His Lordship in addition to the recognition of the general rule, did acknowledge the exception ie, to amend an order or judgment under the slip rule as enacted in O. 20 r. 11.

Gopal Sri Ram JCA, the fifth judge in *Badiaddin*'s case, *supra*, referred to the issue and application of the doctrine of *functus officio* which prevents a final order of the court being reopened, but did not jettison the exception ie, the power to amend a judgment or an order of the court under the slip rule.

It is necessary to categorically state that the other issues raised, heard and determined in the Federal Court case in *Badiaddin*, *supra*, do not concern the issue relating to the amendment of a judgment or an order under O. 20 r. 11.

Reverting to the facts of this case, as alluded to above, and on the foregoing grounds, I find that the two issues *viz*. the non-application of the slip rule and the application of the doctrine of *functus officio* raised for the defendants are utterly unmeritorious and cannot be legally upheld. In the circumstances, I allow the plaintiff's application and make an order in terms in encl. (38).